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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD YOUNG SIGLER, M.D.,

Petitioner,

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAN C. GUTHRIE, JR.

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38 pp

QUESTIONS PRESENTED

1. Whether Petitioner was denied his Fifth and Sixth Amendment rights to due process of law and the effective, conflict-free assistance of counsel where his trial attorney had previously represented the government's chief witness in an illegal and unethical scheme, and which fact was brought before the jury in the trial of this case without opposition or rebuttal from trial counsel.

2. Whether, after these facts were disclosed, the trial court erred in failing to conduct an inquiry concerning the possibility of a conflict of interest on the part of Petitioner's trial counsel.

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HOWARD YOUNG SIGLER, M.D.,

Petitioner,

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Howard Young Sigler, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra) was not reported. *See* 729 F2d 1457 (5th Cir. 1984).

JURISDICTION

This is a criminal case. The opinion and judgment of the Court of Appeals were entered March 23, 1984. Timely petition for rehearing was denied May 7, 1984 (Appendix B, infra). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall *** be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The Petitioner was charged by indictment, and convicted by the jury, on eleven counts of illegally dispensing controlled substances. 21 U.S.C. § 841(a)(1). This reflects the basis for federal jurisdiction in the court of first instance.

Petitioner, a physician, was charged with unlawfully dispensing controlled substances not in the usual course of professional practice for a legitimate medical purpose. 21 C.F.R. § 1306.04(a)(1974). At trial Petitioner was represented by Ron Waldie, retained counsel.

The government's case came from the testimony of two young women, Virginia Gayle Sparks and Susan Almon Cannon, admitted drug addicts, who testified that the 73 year old Petitioner was trading drugs for their sexual favors. Much of the damaging testimony came from Sparks.

It was developed before the jury, primarily during attorney Waldie's cross-examination of Sparks, that Waldie had once represented Sparks, the nature thereof being a personal injury claim wherein Waldie sent Sparks to see Petitioner, for the purpose of establishing a *fraudulent*

claim for damages. (Tr. 61-62; 65; 94; 96-97; App. C-1, 2, C-3, C-6). (The pertinent portions of the record are reproduced as Appendix C, infra; citation herein is to both the page of the transcript and the page wherein same appears in Appendix C).

Particularly, Waldie developed from Sparks that she came to see him in 1977, and that he referred her to Petitioner. (Tr. 94; App. C-4). Waldie paraphrased her testimony that this was for the purpose of establishing a fraudulent claim for damages, and she responded that "you sent me to him and I went. I was as guilty as you all were." (Tr. 94; App. C-4). She did not recall complaining of anything to Petitioner, but rather "just went to him like I was told." (Tr. 95; App. C-4).

For some reason, Waldie thought it useful to make the point that Sparks had, therefore, lied when she went to see Petitioner in 1977, to which Sparks responded, "I didn't lie to him. He knew what I was there for. We were both grown adults. He knew why you sent me to him." (Tr. 96; App. C-6). When Waldie asked "I didn't send you there in '82, did I," she replied "you sent me there in '77 for a fraudulent insurance claim." (Tr. 96; App. C-6). Waldie's only retort was "All right. And you went there and you say you lied to him at that time." (Tr. 96; App. C-6).

During a later bench conference, the trial court expressed concern over the matter, to which Waldie said "Well, I didn't know I even represented her until last Friday (before the Monday of trial) when I talked to her on the phone but I didn't actually represent her. I represented Torres and she was in the car with him." (Tr. 160; App. C-7). However, Waldie also stated that he had told the prosecutor "before we started that I had represented her back there and he was aware of this before we started." (Tr. 161; App. C-8).

While the court continued to express concern, no further action was taken. (Tr. 161-162; App. C-8).

Thereafter, no attempt was made by defense counsel to cross-examine Sparks about her testimony, nor was any effort made to object to it on any pertinent ground, such as that it was extrinsic misconduct and prejudicial. At no time did defense counsel suggest or the trial court explore the possibility that Waldie could not cross-examine the witness without compromising the former attorney-client relationship. Yet were that the case, so that Waldie could not ethically attack his former client, Petitioner's right to conflict-free and effective counsel was lost.

In fact, rather than trying to insure that the court and the Petitioner were made fully aware of the possible problem, attorney Waldie's efforts were directed towards discouraging any further inquiry. He told the court he was "comfortable" with the situation (Tr. 160; App. C-7), that the prior representation "doesn't relate to this," (Tr. 160; App. C-7), that it was some time ago and he had not seen or heard from her since, and that he thought the court was "safe" from having to declare a mistrial. (Tr. 161; App. C-7). Waldie also related that he "hoped" there were no other witness with whom he had had some previous relationship. (Tr. 162; App. C-8).

No effort was made before the jury to rebut, explain, or minimize the obviously harmful effect of Sparks' testimony. In fact, the manner in which Waldie did question Sparks was such as to imply that her allegations were truthful. By his questions, Waldie obviously knew of the "fraudulent claim." (Tr. 93, 94; App. C-3, 4). Taken as a whole, Waldie's questions tacitly admit (to Petitioner's detriment) that he had represented Sparks in 1977, and had sent her to see Petitioner.

Equally, if not more telling, is the absence of any question from Waldie, when Petitioner testified, to rebut, explain, or mitigate the allegations made by Sparks. Sparks saw Petitioner in 1977, then next saw him in December, 1982, when she had a "real" accident. (Tr. 62, App. C-2). Waldie specifically stated before the jury, on direct examination of Petitioner, that he did not want to go into the 1977 matter. (Tr. 367). Not surprisingly, then, he did not give Petitioner the opportunity to testify about Sparks' "fraudulent claim" allegation.

To summarize the pertinent facts, then, the record shows (1) that Petitioner's trial counsel had previously represented the government's chief witness, (2) that trial counsel's representation of the witness involved both illegal and unethical conduct, (3) that this relationship became an issue before the jury, (4) that Petitioner was directly implicated in that conduct, (5) that trial counsel did nothing to oppose or rebut the evidence of this illicit prior relationship, and (6) that no inquiry into the possibility of an actual conflict was made.

ARGUMENT

Two issues are presented here: (1) whether the record reflects that Petitioner was denied due process of law and the effective assistance of conflict-free counsel, and (2) whether the trial court should have conducted an inquiry as to the scope of any conflict so that Petitioner could make an informed decision whether to proceed with Waldie as his counsel. The Court of Appeals concluded (1) that there was no actual conflict, and (2) that the possibility of the development of a conflict was not sufficiently real to require the trial court to inquire. (Op., pp. 4-5; App. A-4, 5). Petitioner respectfully submits that the Court was wrong on both counts.

The jury heard, from witness Sparks, that she had been represented six years earlier by Waldie, who had arranged for her to see Petitioner in his capacity as a medical doctor. The jury also heard that the purpose of her visit to Petitioner was to establish a false and fraudulent claim for injuries. The obvious and undeniable inference was that Petitioner and his defense counsel had engaged in an illegal and unethical conspiracy, implicating both Waldie's legal practice and Petitioner's medical practice. That such a revelation was prejudicial to Petitioner before the jury in the trial of this case can hardly be questioned. Yet no effort was made to challenge or rebut such clearly harmful testimony.

Truly independent defense counsel would see a virtually mandatory responsibility to attack such testimony with all the vigor at his command. Waldie, however, did nothing. What reason could there be for his failure to act? The only possible logical answers must be (1) that Waldie could not, in good faith, challenge Sparks on the point because he knew her allegations were true, (2) that he felt he could not attack Sparks because the allegations arose out of a protected attorney-client relationship, (3) that Waldie avoided the subject to protect himself, or (4) that he could attack Sparks allegations only by becoming a witness himself. None of these possibilities excuses Waldie's failure to act or the trial court's failure to explore the area so that Petitioner's rights could be protected. All would establish a conflict of interest.

The "Assistance of Counsel" guaranteed by the Sixth Amendment means nothing if not that an accused has the right to a lawyer who is untrammeled and unimpaired by the simultaneous representation of conflicting interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942). This is codified in every known set of rules governing the conduct

of lawyers, including the Rules Governing the State Bar of Texas, Art. 320a-1 (State Bar Act), Vernon's Tex. Stat. Ann., Title 14, Appendix, Rule DR5-101-105.

Here, at the very least, Waldie was potentially the only independent witness who could have rebutted Sparks, yet without withdrawing as Petitioner's counsel, he was prohibited from testifying in the case under Rules DR5-101 and 102. Most certainly, then, this record shows the significant likelihood of a conflict of interest, if not, inferentially, the existence of an actual conflict.

If an *actual* conflict of interest were shown, there is no question but that this conviction would be reversed, because there is no sufficient waiver of Petitioner's right to conflict-free counsel. *Glasser v. United States, supra; Holloway v. Arkansas,* 435 U.S. 475 (1978); *United States v. White,* 706 F2d 506 (5th Cir. 1983). Here, at the very least, the record shows the very real possibility of a conflict, as the trial judge noted. The record also shows a deliberate effort by Waldie to discourage further inquiry, and the marked absence of any attempt to rebut, counter, or mitigate the testimony of Sparks. On whose shoulders falls the obligation to explore the matter then? Surely the law neither looks to Petitioner, himself, to develop the record, nor penalizes him later when it is not fully developed. In this instance defense counsel's position in the matter was abundantly clear -- he wanted nothing further said or done. Only the trial court was in the position to make inquiry. While we submit that full inquiry may well have resulted in the already-worried trial judge taking steps to protect Petitioner, only if such inquiry were made could Petitioner have the chance to demonstrate error.

It is important to note the various factors that have been considered by the courts in deciding whether a conflict exists such as will entitle an accused to relief. Since

there was no inquiry below, some of these facts were not developed, of course, but a listing of them should help demonstrate why the trial court ought to be required to conduct some sort of hearing, since the typical layman defendant would not have the capacity to assert his rights or try to build the record himself.

The factor most often mentioned is whether defense counsel appeared to have been hindered in his cross-examination or rebuttal of the former-client witness. *See United States v. Bynum,* 485 F2d 490 (2nd Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974); *United States v. Cochran,* 499 F2d 380 (5th Cir. 1974); *United States v. Jeffers,* 520 F2d 1256 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); *United States v. Martinez,* 630 F2d 361 (5th Cir. 1980), cert. denied, 450 U.S. 922 (1981); *People v. Owens,* 388 N.E.2d 170 (Ill. App. 1979); *and see* cases collected at 18 A.L.R.4th 360 (1982), 53 A.L.R.Fed. 140 (1981), 34 A.L.R.3rd 470 (1970), 27 A.L.R.3rd 1431 (1969).

In this case, the Court of Appeals found that Waldie "vigorously cross-examined Sparks and specifically attacked her credibility on grounds that she admittedly lied to Dr. Sigler in 1977 about the nature and extent of her injuries." (Op., p. 5; App. A-4). While cross-examination may have been generally "vigorous," it was at times less than effective. But, more importantly, there was absolutely no cross-examination of Sparks about the allegations of prior misconduct involving Petitioner and his lawer. The particular attack singled out by the Court of Appeals (Waldie's effort to show that Sparks lied in 1977) not only does not support that Court's conclusion, but devastates it. Waldie's attempt to show that Sparks lied in 1977 is nothing but a bald-faced admission that her allegations of misconduct were true. In the light of Waldie's glaring

failure to challenge Sparks' assertions in any fashion, the jury could only have been left with the conclusion that Sparks' assertions were true, and that, then and now, Petitioner and his lawyer were crooks.

Therefore, if it is important in deciding such questions as this that the record reflects no apparent diminishment in counsel's efforts at cross-examinating or rebutting the testimony of a former client-witness, this record shows a complete default in that area. We are left to make "nice calculations" as to why, because no attempt to inquire about the scope and extent of the conflict was made.

Other factors sometimes mentioned include whether the former client-witness had furnished confidential information possibly useful to the accused, *Doe v. United States,* 666 F2d 43 (4th Cir. 1981); *Stephens v. United States,* 453 F.Supp. 1202 (M.D. Fla. 1978); *People v. Owens, supra;* whether the former client-witness had either waived any privilege or asserted it, *United States v. Jeffers, supra; United States v. Armendo-Sarimiento,* 524 F2d 591 (2nd Cir. 1975); *United States v. Shepard,* 675 F2d 977 (8th Cir. 1982); and whether the former relationship had been fully severed, *United States v. Donatelli,* 484 F2d 505 (1st Cir. 1973). There are several more. *See* 53 A.L.R.Fed. 140 (1981); 27 A.L.R.3rd 1431 (1969). Considering the complication and number of the factors involved, it is patently unfair to require an accused, himself, to develop the record. It is equally unfair to deny relief on the basis that the record is undeveloped.

In *Holloway v. Arkansas, supra,* this Court reserved for another day the question of "the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interest." 485 U.S. at p. 483. In *Holloway,* this Court noted

that the reported decisions have taken divergent approaches to the issue, particularly where trial counsel fails to take the initiative in fully disclosing and exploring apparent conflicts.

When the question was next visited, in *Cuyler v. Sullivan,* 446 U.S. 335 (1980), the Court ruled, based upon the facts of that case, that where no participant lodged an objection, the Sixth Amendment imposed no duty on the trial court to initiate inquiry, so long as the court does not know "or reasonably should know that a particular conflict exists. . . ." 446 U.S. at p. 347.

This case presents the previously-unresolved question when a trial court must inquire into the nature and scope of a potential conflict of interest where the possibility of same has been made known to the court, and where the lawyer who may have the conflict takes no action himself to explore the area. Implicated in this question is the right of the accused to become personally involved in such an inquiry, particularly where his lawyer neither counsels with him nor provides guidance to him about the subject. This case presents to the court the ideal opportunity to resolve these issues, and to converge the previously divergent decisions.

The right to effective assistance of counsel is fundamental. *Argersinger v. Hamlin,* 407 U.S. 25 (1972); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Glasser v. United States, supra.* It is extremely personal to the accused, and though his right may be waived, he can only do so after becoming personally involved, with the guidance of the court, in any such decision. *Faretta v. California,* 422 U.S. 806 (1975). This concept naturally includes the right to waive conflict-free counsel, as long as the accused is personally involved in that decision-making process. *United States v. Garcia,* 517 F2d 272 (5th Cir. 1975).

As noted above, the existence of an actual conflict is cause for "automatic" reversal, with no showing of actual prejudice required. *Glasser v. United States, supra; Holloway v. Arkansas, supra.* The problem arises where neither the trial court nor defense counsel explores the question of a possible conflict, so as to apprise the accused personally of the potential problem and so that he can make an intelligent, informed decision. If this Court does not impose a duty on trial courts to make some inquiry once the possibility of a conflict becomes known, the accused is left with the Hobson's Choice of relying for protection of his right either on his lawyer, who may be "serving two masters," or on himself. The former is unacceptable for the obvious reason that a lawyer who has a conflict cannot, by definition, be relied upon to fully protect the interests of the accused. The latter is unreasonable, for it places on the unskilled layman the burden of knowing, understanding, and applying the laws to his situation. Only the judge is in the position to determine the facts and protect the accused.

Absent the guidance of the trial court, it would be virtually impossible for an accused to ask the right questions or otherwise cause the record to reflect that a *potential* conflict is really an *actual* conflict. The latter *is* grounds for relief, while the former only *may* be.

An accused is constitutionally entitled to learned assistant in exploring the question, for "the Constitution also protects defendants whose attorneys fail to consider, or choose to ignore potential conflict problems." *Cuyler v. Sullivan, supra,* at 446 U.S. 351 (Justice Brennan concurring). Under circumstances such as exist in the instant case, where counsel not only failed to explore the potential conflict but actively discouraged further discussion, even after the trial court expressed concern, Petitioner was entitled to be put on notice of the problem and to have a

court-conducted inquiry of some sort. It is beyond Petitioner's ability to conduct such an inquiry personally, for he cannot be charged with knowing how to explore the myriad factors set forth above that go into the determination whether a potential conflict is an actual one.

At the very least, the court has a duty to bring the potential conflict to the attention of the accused and explain to him his rights in the matter. But here, as in *United States v. Martinez, supra,* the record fails to show that the court addressed Petitioner at all. Also as in *Martinez,* the record shows only a bench conference, so there can be no inference that Petitioner was otherwise advised of the possibility of a conflict that might entitle him to relief. Due process standards surely require at least that.

To summarize Petitioner's complaints, we first respectfully submit that this record plainly shows the existence of an actual conflict of interest on the part of Petitioner's trial counsel, so that reversal is required without the need to "nicely calculate" the amount of prejudice. The Court of Appeals erred in concluding otherwise.

Secondly, the Court of Appeals erred in holding that on this record there was no need for the trial court to conduct an inquiry, as required both by Fifth Circuit precedent *(United States v. Garcia, supra)* and by *Cuyler v. Sullivan, supra.*

Lastly, to the extent that prior decisions of this Court do not impose on the trial court the duty to inquire under the circumstances here presented, the Court should now impose such a duty, as a necessary step to protect the Fifth and Sixth Amendment rights of any accused to conflict-free assistance of counsel and a fair and impartial trial.

PRAYER FOR RELIEF

Petitioner prays that the judgment of the Court of Appeals below be set aside and this case remanded for a new trial, or, alternatively, that the case be remanded to the trial court for a hearing on the nature and scope of the potential conflict of interest so clearly shown in this record.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were served on the Solicitor General, Department of Justice, Washington, D.C. 20530 by depositing same in the United States mail, first class, postage prepaid. All parties required to be served have been served herewith.

ROBERT T. BASKETT

APPENDIX A

IN THE

United States Court of Appeals for the Fifth Circuit

NO. 83-1410

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HOWARD YOUNG SIGLER, M.D.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

(MARCH 23, 1984)

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.
DAVIS, Circuit Judge:

Dr. Howard Sigler appeals his jury conviction on eleven counts of illegally dispensing Schedule 2 controlled substances under 21 U.S.C. § 841(a)(1) (Supp. VIII 1982) and 21 C.F.R. § 1306.04(a)(1974).[1] We find no error and affirm.

[1] (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(i) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

...

(Continued on page A-2)

I.

Defendant was a practicing orthopedic surgeon in Dallas, Texas. The government's evidence showed that Dr. Sigler on several occasions prescribed Schedule 2 drugs in exchange for sexual favors. The two patients who received the drugs were Virginia Sparks and Susan Cannon. They both testified in vivid detail concerning the circumstances surrounding their receipt of the drugs and the favors they furnished Dr. Sigler. It was clear from the testimony of both women that the drugs Dr. Sigler furnished them were not for a legitimate medical purpose.

A jury was entitled to believe from Sigler's records that Sparks visited Dr. Sigler thirteen times between December 14, 1982, and February 3, 1983, and that she received prescriptions for controlled substances on six out of the thirteen visits. Likewise, according to Sigler's own records, Cannon visited Dr. Sigler's office on twelve occasions between January 4, 1983, and February 2, 1983, and received controlled substances on five of the twelve occasions. The government, in anticipation of Dr. Sigler's defense that the drugs were prescribed in response to legitimate medical needs, called Dr. William M. Osborne, a practicing orthopedic surgeon. Dr. Osborne testified that Sigler's prescription of controlled substances to Sparks and Cannon went beyond the bounds of usual medical practice.

(Continued from page A-1)

21 U.S.C. § 841(a)(1) (Supp. VIII 1982).

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

21 CFR § 1306.04(a)(1974).

Sigler raises several errors on appeal: (A.) the evidence was insufficient to sustain the conviction; (B.) Sigler was denied effective assistance of counsel; (C.) it was plain error to admit extrinsic act evidence without a limiting instruction; and (D.) the trial court erred in excluding evidence that Sigler had carefully treated other patients and that at most his treatment of Sparks and Cannon was negligent.

II.

A.

Appellant's contention that the evidence was insufficient to support the conviction is clearly meritless. The jury was entitled to conclude from the evidence that: 1) Sparks and Cannon both received narcotic drugs as charged in the indictment without an examination despite overt signs that both women were addicts; 2) Sigler gave the women prescriptions for drugs and in some instances the money to fill them in exchange for sexual favors; 3) inordinate quantities of drugs were furnished to Sparks and Cannon at intervals inconsistent with usual medical treatment; and 4) no logical relationship existed between the drugs prescribed for Sparks and Cannon and conditions for which they were allegedly being treated.

B.

Defendant claims that his attorney, Mr. Waldie, had a conflict of interest and as a result defendant did not receive competent, conflict-free counsel. This contention is based on an exchange during Mr. Waldie's cross-examination of Virginia Sparks. In response to a question to Sparks as to why she originally visited Sigler's office in 1977, Sparks testified that after an automobile accident Waldie referred her to Dr. Sigler to obtain fraudulent confirmation of

injuries. Sigler argues that when Sparks accused Sigler and Waldie of conspiring with her to establish a fraudulent insurance claim, a conflict of interest arose and the judge should have warned Sigler of the conflict and its potential pitfalls as required by *United States v. Garcia*, 517 F.2d 272, 277-78 (5th Cir. 1975). Defendant articulates two possible conflicts of interest: (1) Waldie previously represented Sparks and may have acquired confidential information from Sparks that Waldie would be unable to use in cross-examining her; (2) because of Sparks' accusation that Waldie had participated in a scheme to establish a fraudulent personal injury claim, it was in Waldie's interest to divert the cross-examination of Sparks away from facts that might tend to inculpate counsel in the illegal activity.

We agree with the trial judge that the possibility of the development of an actual conflict of interest was not sufficiently real to require the judge to give defendant the warnings suggested in *Garcia*.

If Mr. Waldie represented Sparks in 1977,[2] it was on a civil claim completely unrelated to the facts on which Sigler's indictment was based. The only importance of the 1977 visit Sparks made to Sigler was to show the background facts of how Sparks came to know Sigler. As far as the contention that Mr. Waldie pulled punches in cross-examining Sparks to avoid incriminating himself, our review of the record shows that this simply did not occur. Counsel vigorously cross-examined Sparks and specifically attacked her credibility on grounds that she admittedly

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[2] Although we must assume for purposes of this appeal that Mr. Waldie represented Sparks in 1977, we note that Mr. Waldie denied recollection of the representation and we do not suggest that this fact has been established.

lied to Dr. Sigler in 1977 about the nature and extent of her injuries. We conclude that Mr. Waldie had no actual conflict of interest and reject appellant's contention that his sixth amendment right to conflict-free counsel was violated. *See United States v. White,* 706 F.2d 506, 509 (5th Cir. 1983).

C.

In response to an inquiry about how she came to contact Dr. Sigler, Cannon testified that a friend told her that Sigler would provide Dilaudid. Canon also testified that she shared drugs obtained from Sigler with friends who had told her about Sigler. No objection was raised by defendant to this testimony and no request for a limiting instruction was made. Appellant contends that it was plain error to admit the evidence without a limiting instruction. Failure to exclude the evidence because of its hearsay character is clearly not plain error. *See United States v. Harbin,* 601 F.2d 773, 780 (5th Cir. 1979).

Under Federal Rule of Evidence 404(b), evidence of acts extrinsic to those charged is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Under the teaching of *United States v. Beechum,* 582 F.2d 898, 910-11 (5th Cir. 1978), if Cannon's friend, who referred her to Sigler, had testified that Sigler had recently furnished drugs to her under circumstances similar to those for which Sigler was indicted, the trial court could have admitted the evidence with a limiting instruction.[3] It was not plain error to admit

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[3] The court failed to give a limiting instruction; however, the following instruction was included in the court's closing general charge: "I caution you, members of the jury, that you are here to determine the guilt or innocence of the defendant from the evidence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment." R. 180.

the testimony without a limiting instruction. See *Harrison v. United States,* 387 F.2d 614, 615 (5th Cir. 1968); *Berry v. United States,* 271 F.2d 775, 776 (5th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960). *Accord United States v. Cifarelli,* 401 F.2d 512, 514 (2nd Cir.), *cert. denied,* 393 U.S. 987 (1968).

Sigler also maintains that evidence of defendant's activity, unrelated to acts charged in the indictment, was improperly admitted. The government was allowed to introduce evidence that Sigler prescribed a narcotic-based cough suppressant during the time Sigler was charged with improperly prescribing narcotics to Cannon. This evidence tended to demonstrate Sigler's loose, irregular practice of prescribing several narcotic drugs simultaneously and no error was committed in admitting it. Also, McDonald, a former Sigler employee, was allowed to testify to alterations Sigler made in patient records and his cavalier attitude toward writing prescriptions for drugs unrelated to those enumerated in the indictment. McDonald was a rebuttal witness and her testimony was properly admitted in light of Sigler's explanation of his prescribing practices and the contested factual issue of whether Sigler had altered his medical records in anticipation of the trial.

D.

The trial court would not allow Sigler's patients to testify that they had received good medical treatment from Sigler. Sigler argues that the evidence was admissible as character evidence. Sigler's diligence as a physician does not relate to his honesty, integrity or any other trait generally considered a character trait. The trial court permitted defendant to call five character witnesses. The trial judge has broad discretion in determining how many character

witnesses will be permitted to testify. We find no abuse of that discretion here. *See Michelson v. United States,* 335 U.S. 469, 480 (1948). *See also United States v. Davis,* 546 F.2d 583, 592 (5th Cir.), *cert. denied,* 431 U.S. 906 (1977).

The final error complained of relates to the failure of the trial judge to permit the jury to consider a conclusory remark made by a government witness on cross-examination that a physician could, as a result of negligence, improperly prescribe medication. The testimony was not probative or helpful to the jury in resolving any fact at issue. The trial court did not abuse its discretion in excluding the testimony.

AFFIRMED.

APPENDIX B

IN THE

United States Court of Appeals for the Fifth Circuit

NO. 83-1410

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HOWARD YOUNG SIGLER, M.D.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(May 7, 1984)

Before RUBIN, JOHNSON, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

W. EUGENE DAVIS
United States Circuit Judge

APPENDIX C

• • •

(WITNESS SPARKS,

QUESTIONS BY THE GOVERNMENT)

Q Did you go see him in 1977?

A Yes, sir.

Q Okay. Why did you go see him in 1977?

A An automobile accident.

Q All right. How did you pick that doctor?

A I was referred to him by a friend from a lawyer to Dr. Sigler.

Q How long in 1977 — how long a period of time did you see him?

A I would say about two months, maybe less. I am not sure.

Q Did you say two months?

A Maybe not, about six weeks.

Q All right. Do you recall whether or not he performed any surgery on you at that time?

A No surgery.

Q Do you recall whether or not he prescribed any medication for you?

A No medication.

Q What did he do at that time?

A Gave me a heat lamp treatment. That is it.

Q For some — what was it supposed to be, an injury from a car accident?

A Yes, sir.

Q Were you in fact injured?

A I was injured but not my neck and my back was not injured.

Q What was wrong with you?

A I had stitches in my left arm.

Q You have indicated your forearm. Did you have a cut there on the left forearm?

A Two small cuts.

Q But no injuries to your neck or back?

A No, sir.

Q Okay. After you saw him for approximately two months around the time of that accident did you have a real accident?

A Yes, sir.

Q After you saw him for about two months around the time of that accident when did you next see him?

A I am sorry. Repeat the question, please.

Q After you saw him for about two months around the time of the car accident in 1977 when is the next time you saw him?

A December the 14th.

Q Of what year?

A '82.

• • •

Q How did you end up going to Dr. Sigler in December of 1982?

A I was spending a great deal of money and I figured I would gamble and since I had been to Dr. Sigler before on

my automobile accident which was fraudulent, I thought I would take my chances and see if he would give me a prescription or I could make some kind of deal with him, just went and took a chance that he would write them for me.

Q Okay. Would you tell the members of the jury as best you can the first time you went to see Dr. Sigler in 1982? When was that approximately?

A Okay. My first visit to Dr. Sigler was on the 14th of December and he did give me Dilaudid and asked me to return the next morning early before his office opened and I told him I would do this and I left.

Q Okay. Let me back up just a step and ask you about when you went to his office did you call and make an appointment?

A No sir.

Q Did anyone else call for you or send you there?

A No, sir.

Q Did you go to his office alone or did someone drop you off or go with you?

A I went alone.

Q Where in his office?

• • •

(WITNESS SPARKS; QUESTIONS BY MR. WALDIE)

Q And you and Mr. Torrez came to my office, didn't you?

A Yes, sir.

Q And you were referred to Dr. Sigler, isn't that correct?

A That is correct.

Q You just told this jury that that accident that we made claim for to Farmers Insurance Group was fraudulent, isn't that what you said?

A I said that my neck and back was not injured in that accident is what I said.

Q Did you tell the doctor it was?

A I didn't tell the doctor anything.

Q When you went in 1977 —

A L don't remember. You sent me to him and I went. I was as guilty as you all were.

Q Did you go there with Ronnie Torrez?

A Yes, I did, my husband.

Q And did he give you a physical examination at that time?

A I don't remember.

Q Did you complain at that time of severe headaches?

A No.

Q Did you complain of pain and stiffness in your neck?

A No, not that I remember. I don't recall complaining of anything. I just went to him like I was told.

Q Did you complain of pain in your back and your left shoulder?

A No.

Q Did you tell Dr. Sigler that you were injured on March the 18th of 1977 when you were riding in the front

seat of a car that ran off the road and turned over several times?

A Yes.

Q Did you tell Dr. Sigler that you were taken to a local hospital for emergency treatment?

A I don't know if I told him or not but I was.

Q Did you tell Dr. Sigler that lacerations had been sewed upon your left arm?

A Did I tell Dr. Sigler that I had lacerations? Well, I had been, yes. I don't know — like I said, I don't know if I told him but they were there.

Q Do you remember being treated for this accident that we are talking about?

A At the hospital? Excuse me. You mean at the hospital being treated?

Q Uh-huh.

A Yes, uh-huh.

Q And do you remember being treated from March the 25th of 1977 until July the 15th of 1977 for this accident?

A Yes, sir.

Q Now, when you went to Dr. Sigler on December the 14th of 1982 you also told him that your neck and back was hurt, didn't you?

A I — did I tell Dr. Sigler I was there for the old — for the old and back neck injuries, yes, sir.

Q Old back and neck injury? So now you do recall you had a neck and back injury in the 1977 accident?

A No, I don't say I recall. I said that I had one which wasn't true at that time and it isn't true at this time. I lied.

Q You lied? Well, did you lie to him in 1977?

A Yes.

Q And now you have lied to him again in 1982?

A I didn't lie to him. He knew what I was there for. We were both grown adults. He knew why you sent me to him.

Q Did you lie to him — I didn't send you there in '82, did I?

A You sent me there in '77 for a fraudulent insurance claim.

Q All right. And you went there and you say you lied to him at that time?

A I didn't tell him anything. I just went there because you told me to and they gave me treatment. That is all I remember.

Q How did he come up with this neck, back and all this stuff?

A I guess for the insurance claim.

(BENCH CONFERENCE)

• • •

MR. WALDIE: What I was saying she had been convicted of conspiracy to distribute Dilaudid and then they had sent her to Pleasanton, California and then brought her back to Fort Worth and then brought her here from there. That is what I was telling you.

THE COURT: She is on a special parole term now. I would have to wonder how long she can stay out. I am going to talk to her.

What was this about your representing Virginia Sparks. I have some real problem about your questioning a witness you represented.

MR. WALDIE: Well, I didn't know I even represented her until last Friday when I talked to her on the phone but I didn't actually represent her. I represented Torres and she was in the car with him.

THE COURT: All right. She seemed to know about you and having some conversation. Didn't that make you uncomfortable?

MR. WALDIE: I feel comfortable with it, Judge.

THE COURT: I don't.

MR. WALDIE: It doesn't relate to this.

MR. McCONATHY: I can take her, Judge. There is no big problem.

THE COURT: I understand you did have some dealings with her.

MR. WALDIE: Some time ago.

THE COURT: I understand it was 1977.

MR. WALDIE: But I haven't seen or heard of her since then, Judge. I haven't had any connection with her since then.

THE COURT. I am not saying that. The problem is that having done something for her then are you disqualified in connection with any kind of representation? I am concerned about it.

MR. WALDIE: I don't think I would be, Judge. I think that I would not be disqualified. It would be the same thing —

THE COURT: I would hate to have a mistrial. That is my only problem.

MR. WALDIE: I think we are safe there, Judge.

THE COURT: I mention it to you and if the Government wants to say anything about it all right. I am not going to carry it much further I don't think although I really am concerned about it and the fact of your trying to cross-examine somebody.

MR. WALDIE: I told Bob before we started that I had represented her back there and he was aware of this before we started.

THE COURT: It is not a question of advising Bob. I appreciate your doing that but the question is the overall situation here vis a vis the jury, the Defendant and the witness. Irrespective of the Government that is what concerns me about it and I am not trying to tell you I have decided. I am just telling you I have got a real concern about it. You got anybody else like that?

MR. WALDIE: What?

THE COURT: I hope you haven't got anybody else.

MR. WALDIE: I hope not. Judge, I don't even know this Almon girl.

THE COURT: Who will be your next witness in the morning?

MR. SMITH: Dr. Lowry.

THE COURT: How many more witnesses have you got?

MR. SMITH: Two, Dr. Lowry and Dr. Osborne.

THE COURT: I will see you in the morning at nine o'clock.

• • •

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FILED
DEC 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-15

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOWARD YOUNG SIGLER, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel because of his attorney's previous representation of a prosecution witness.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1984, and a petition for rehearing (Pet. App. B) was denied on May 7, 1984. The petition for a writ of certiorari was filed on July 6, 1984.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on 11 counts of illegally dispensing controlled substances, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment on each count, to be followed by a three-year term of special parole, and was fined a total of $100,000.

Briefly summarized, the government's evidence at trial established that between December 1982 and February 1983, petitioner, a practicing orthopedic surgeon, prescribed controlled substances to two female patients, Virginia Sparks and Susan Cannon, in exchange for sexual favors (Pet. App. A2; see Tr. 80-81, 87, 101-103, 136-137, 139-147). During direct examination by the prosecution, Sparks testified that she first had visited petitioner in 1977 for treatment for feigned injuries to her neck and back resulting from an automobile accident (Pet. App. C1-C3; Tr. 61-62, 65). During cross-examination, Ronald Waldie, one of petitioner's two trial counsel, conducted further inquiry concerning this incident. In response to Waldie's questioning, Sparks stated that, after she and her husband had come to Waldie's office, he had referred her to petitioner for treatment in connection with the submission of a fraudulent insurance claim (Pet. App. C3-C4; Tr. 93-94). Waldie then sought to elicit admissions from her that she had lied to petitioner, both on that occasion and during her visits in December 1982, conerning the nature and extent of her injuries (Pet. App. C5-C6; Tr. 96-97):

> Q Now, when you went to Dr. Sigler on December the 14th of 1982 you also told him that your neck and back was hurt, didn't you?
>
> A I — did I tell Dr. Sigler I was there for the old — for the old and back neck injuries, yes, sir.
>
> Q Old back and neck injury? So now you do recall you had a neck and back injury in the 1977 accident?
>
> A No, I don't say I recall. I said that I had one which wasn't true at that time and it isn't true at this time. I lied.
>
> Q You lied? Well, did you lie to him in 1977?

A Yes.

Q And now you have lied to him again in 1982?

A I didn't lie to him. He knew what I was there for. We were both grown adults. He knew why you sent me to him.

Q Did you lie to him — I didn't send you there in '82, did I?

A You sent me there in '77 for a fraudulent insurance claim.

Q All right. And you went there and you say you lied to him at that time?

A I didn't tell him anything. I just went there because you told me to and they gave me treatment. That is all I remember.

Q How did he come up with this neck, back and all this stuff?

A I guess for the insurance claim.

After this colloquy, Waldie continued what the court of appeals characterized as a "vigorious[]" cross-examination of Sparks (see Pet. App. A4). He questioned Sparks concerning her extensive use of drugs over a four-year period and her plans to obtain drugs from a dentist (Tr. 115-116, 121-125); her reasons for visiting petitioner in December 1982 (Tr. 97-100); the circumstances of the visits (Tr. 101-105, 116-121); whether she had not misled petitioner into believing she was in pain (Tr. 97, 125-126; see also Tr. 95-96); the details of her agreement with the police to assist in the investigation against petitioner in exchange for leniency in the prosecution of charges then pending against her (Tr. 107-109); petitioner's apparent reluctance to prescribe the drugs (Tr. 112); her prior inconsistent statement to the grand jury (Tr. 112-114); her thefts to obtain money

to buy drugs (Tr. 115); her prior criminal record (Tr. 115); and her subsequent unsuccessful attempts to obtain drugs from petitioner (Tr. 123).

Following Sparks' testimony, the district court conducted a side bar conference and inquired concerning Waldie's previous representation of Sparks (Pet. App. C6-C8; Tr. 160-162). Waldie responded (Pet. App. C7; Tr. 160):

> Well, I didn't know I even represented her until last Friday when I talked to her on the phone but I didn't actually represent her. I represented [her husband] and she was in the car with him.

Waldie also told the court that he did not feel uncomfortable with regard to the situation that Sparks had raised and that he had advised the prosecutor of his prior contact with Sparks. Waldie also expressed the opinion that there was no basis for his disqualification from continued representation of petitioner or for the declaration of a mistrial (Pet. App. C7-C8; Tr. 160-161).

The court of appeals affirmed petitioner's conviction (Pet. App. A1-A7). It rejected petitioner's claim that, because of Waldie's prior dealings with Sparks, he labored under a conflict of interest. The court reasoned that even if Waldie actually represented Sparks in 1977, it was on a civil matter that was "completely unrelated" to the facts on which the indictment was based (*id.* at A4). Moreover, the court concluded that contrary to petitioner's contention, Waldie had vigorously cross-examined Sparks, specifically attacking her credibility on the ground that she had lied in 1977 concerning the nature and extent of her injuries (*id.* at A4-A5).

ARGUMENT

1. Petitioner contends (Pet. 5-10) that he was denied the assistance of conflict-free counsel at his trial. In particular, he maintains that, as the result of Waldie's previous dealings with Sparks and her accusations during questioning,

Waldie was precluded from challenging her testimony that he and petitioner had engaged in a scheme with her in 1977 to file a fraudulent insurance claim. This fact-bound claim does not warrant further review.

As the court of appeals observed (Pet. App. A4 n.2), when questioned by the trial judge, Waldie denied that he had represented Sparks and stated that he had actually represented her husband following the automobile accident in 1977 (Pet. App. C7; Tr. 160). He further explained that he had had no contact with Sparks since the time of the accident (Pet. App. C7; Tr. 161). Moreover, as the court of appeals observed (Pet. App. A4), the accident in 1977 was unrelated to the facts on which petitioner's indictment was based. These factors considerably attentuate the claim of a conflict of interest arising out of an asserted prior representation of Sparks.

Moreover, this Court held in *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980), that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a constitutional predicate for his claim of ineffective assistance." Therefore, "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Ibid.* There is no basis for such a finding unless a defendant —

> can point to 'specific instances in the record to suggest an actual conflict or impairment of [his] interests' * * * [A defendant] must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.

Barham v. *United States*, 724 F.2d 1529, 1532 (11th Cir. 1984), quoting *United States* v. *Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983). See also *Sullivan* v. *Cuyler*, 723 F.2d 1077,

1089 (3d Cir. 1983) (opinion on remand). Petitioner has not made that showing.

It was during direct examination by the prosecutor, not during cross-examination by Waldie, that Sparks stated that she had first contacted petitioner in 1977 in connection with a feigned injury, which she described as a "fraudulent" endeavor (Pet. App. C2-C3; Tr. 65). Waldie therefore was not responsible for the jury's hearing of Sparks' testimony regarding the fraudulent circumstances of her introduction to petitioner. To be sure, Sparks accused Waldie in off-hand comments during cross-examination of having been involved in a scheme to defraud an insurance company at that time. But the present record does not establish that there was any substance to Sparks' accusation that Waldie actually participated in a fraudulent scheme. An unsolicited and unsupported accusation of defense counsel by a witness on a matter not directly related to the charges against the defendant does not in itself give rise to a conflict of interest. Nor is it clear that these comments about Waldie regarding another incident six years earlier would have incrementally damaged petitioner in the jury's mind. For these reasons, the claim of a conflict of interest in this case is one that would more appropriately have been raised on collateral attack under 28 U.S.C. 2255, rather than on direct appeal, so that petitioner, represented by new counsel, could have developed an evidentiary record concerning the necessary factual predicates of his conflict of interest claim.

Petitioner also errs in contending (Pet. 4, 8-9) that following Sparks' statements about the 1977 incident, Waldie avoided further cross-examination on the subject. In fact, Waldie attempted to exploit to petitioner's benefit Sparks' testimony about the 1977 incident and to exonerate petitioner from any imputation of wrong-doing in connection with it. He elicited an admission from Sparks that she had lied to petitioner about her injuries in 1977 and that she told

him when she visited him again in 1982 that she was seeking medication for her old injuries (Tr. 96-97). Waldie also sought to establish that she in fact was injured in the 1977 accident (Tr. 113), that she did not pay petitioner following the insurance settlement on that occasion, and that petitioner's fee had been withdrawn (Tr. 121-122). In addition, as the court of appeals observed (Pet. App. A4), and as petitioner concedes (Pet. 8), Waldie also "vigorously" cross-examined Sparks on a number of other matters. See pages 3-4, *supra*. On the present record, then, it does not appear that Waldie was deterred in his cross-examination of Sparks or, accordingly, that his performance was "adversely affected" by the asserted conflict of interest. And to the extent Waldie did not press the 1977 matter further, the most natural explanation would appear to be that it would have been both unproductive and tangential, as well as potentially damaging to petitioner, if Sparks elaborated upon her accusations.

Nor is petitioner's claim of a conflict of interest in the circumstances of this case advanced by his assertion (Pet. 6-7) that Waldie was the only witness who could have rebutted Sparks' testimony about the 1977 incident but that he was unable to testify concerning Sparks' accusations because he was petitioner's attorney. Waldie in fact was not the only witness who could have rebutted Sparks' testimony. Petitioner himself obviously could have done so. Yet when petitioner testified, he did not address the 1977 incident. There is no indication that Waldie's decision not to question petitioner about that collateral matter (see Tr. 367) resulted from a conflict of interest, as petitioner speculates (Pet. 5). Waldie's decision is entirely consistent with a reasonable tactical judgment not to highlight the incident further and not to open a subject matter for the prosecutor to expolit on cross-examination relating to allegations of unrelated illegal conduct. Moreover, assuming that Sparks

was correct in her allegations that both petitioner and Waldie had engaged in fraudulent conduct in 1977, Waldie's position at trial — however reprehensible his past conduct — did not thereby conflict with that of petitioner.

It also is not irrelevant for present purposes that if Sparks' allegations were true, petitioner presumably knew of Waldie's illegal conduct when he chose to have Waldie represent him in this case. If so, we question whether petitioner should now be heard to complain that an impermissible conflict of interest developed when Sparks mentioned the prior transaction at trial. Once again, the absence of an evidentiary record on these matters — which were collateral to the issues at trial — is an additional reason why this is an issue that would more productively have been explored on collateral attack under 28 U.S.C. 2255 rather than on this direct appeal.

Finally, as the court below noted (Pet. App. A4), the only importance of Sparks' 1977 visit to petitioner for treatment was to provide background information with respect to how Sparks came to know petitioner. There is substantial reason to question whether the court would have allowed further extensive exploration into its allegedly illegal aspects. See Fed. R. Evid. 403, 404(b). It also appears from Waldie's statements during the ensuing bench conference that he may have had little independent recollection of his previous dealings with Sparks (Pet. App. C7-C8; Tr. 160-161).[1]

---

[1]Petitioner also contends (Pet. 7) that Waldie could not have testified about the 1977 incident without withdrawing as counsel. However, Rule 3.7(a)(3) of the American Bar Association's Model Rules of Professional Conduct does not require withdrawal where disqualification would result in substantial hardship for the client. Here, where the issue arose mid-trial, it is possible that the court would have permitted Waldie to testify without requiring him to withdraw.

2. Petitioner also contends (Pet. 9-12) that the district court had an affirmative obligation to make an inquiry of Waldie concerning the possibility of a conflict of interest and that it failed to fulfill that obligation. However, following Sparks' testimony, the district court in fact *did* inquire of Waldie concerning the details of his previous dealings with Sparks and asked whether those dealings were of such a nature as to require his disqualification (Pet. App. C7-C8; Tr. 160-161). Waldie replied that he had not actually represented Sparks and asserted his belief that his contacts did not constitute a basis for disqualification (*ibid.*). Since "trial courts [must] necessarily rely in large measure upon the good faith and good judgment of defense counsel," who is "in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial" (*Cuyler* v. *Sullivan*, 446 U.S. at 347), the district court's decision not to proceed further at that time does not on the present record furnish a basis for reversal of petitioner's conviction.[2]

---

[2]During the colloquy, petitioner's other attorney assured the court that, should it be necessary to cross-examine Sparks further, he could conduct the questioning (Tr. 160). Where a conflict of interest claim is made, the availability and participation of co-counsel unencumbered by the alleged conflict is a significant factor in resolving the issue. Cf. *United States* v. *Carter*, 721 F.2d 1514, 1538 (11th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General

JOHN F. DE PUE
Attorney

DECEMBER 1984

DOJ-1984-12